

**A Kosbina Konsult (K) Sdn Bhd (in liquidation) v Madu Jaya
Development Sdn Bhd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(C)(W)-1200-06 OF 2017
TENGKU MAIMUN, HASNAH HASHIM AND STEPHEN
CHUNG JJCA
15 MARCH 2019

C
Civil Procedure — Res judicata — Issue estoppel — High Court dismissed claim against appellant by respondent's privy for alleged share in arbitration award on ground of limitation — Whether that finding barred respondent from later suing appellant for same claim — Whether wrong of respondent to add common law unjust enrichment and constructive trust to its pleadings in order to circumvent law on limitation

D
Contract — Unjust enrichment — Subcontract — Whether one party to subcontract could not sue another for unjust enrichment based on common law independent of subcontract — Whether party claiming outstanding sum under subcontract had to prove its entitlement to same — Whether law of unjust enrichment could not be used to displace, defeat, override and/or undermine terms of subcontract — Whether equity and equitable remedies could not aid claimant when facts showed it had deliberately raised equitable issues to circumvent law on limitation

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The appellant ('Kosbina') was awarded a multi-million Ringgit construction project by the government. Kosbina subcontracted the carrying out of the entire project to Maju Jaya Enterprise Sdn Bhd ('MJE'). Under the subcontract, MJE was entitled to 92% commission and Kosbina 8%. The works were, however, carried out by the respondent which was owned by the same person who owned MJE. After granting Kosbina four extensions of time to complete the job, and when the works were about 90% complete, the government suddenly terminated its contract with Kosbina resulting in the subcontract also being terminated. Kosbina filed arbitration proceedings against the government for wrongful termination and was awarded RM21,873,376.73 ('the arbitration award'). MJE subsequently sued Kosbina in the High Court ('the first suit') for a 92% share of the arbitration award based on the sharing formula in the subcontract. The High Court dismissed the suit after holding that MJE was the wrong plaintiff, as it was the respondent that had carried out the works, and that in any event the action was time-barred. The Court of Appeal ('COA') affirmed the decision. Based on the High Court's finding that the subcontract between Kosbina and MJE had been

replaced by one between Kosbina and the respondent, the respondent filed a similar action as the first suit against Kosbina but this time added claims based on unjust enrichment and constructive trust. The respondent contended that the arbitration award unjustly enriched Kosbina at the respondent's expense; that the respondent was entitled to RM11.4m as its share of the total value of works done and costs incurred for the project; and that Kosbina held the RM11.4m as constructive trustee for the respondent. In reply, Kosbina pleaded that the respondent's claim was time-barred and that the High Court's finding on that issue in the first suit against MJE bound the respondent. Kosbina also pleaded that the respondent had not shown how it was entitled to RM11.4m or any part of the arbitration award. The High Court decided that the respondent had carried out the works it was contracted to do and awarded it RM8,360,173.40 being half the arbitration award less certain payments the respondent was not entitled to. The court also held that it was unconscionable for Kosbina to keep the entire arbitration award to itself in disregard to the 92:8 sharing formula agreed under the subcontract. Kosbina appealed to the COA against the decision.

Held, unanimously allowing the appeal and setting aside the decision/order of the High Court:

- (1) The respondent's position that it had no subcontract with Kosbina was not tenable given the High Court's finding in the first suit which was affirmed by the COA. There was thus a subcontract between Kosbina and the respondent which had replaced the subcontract between Kosbina and MJE (see para 32).
- (2) The respondent could not, on the one hand, deny the existence of a contract between itself and Kosbina and contend that its claim for unjust enrichment was made under common law and, at the same time, claim a share of the arbitration award based on the 92:8 sharing formula under the subcontract. The claim for unjust enrichment could not be made independent of the subcontract. The High Court therefore erred in allowing the law of unjust enrichment to displace, defeat, override and/or undermine the clear terms of the subcontract between Kosbina and the respondent (see paras 31, 33–34 & 37).
- (3) The respondent could not subvert the subcontract and claim to be entitled to RM11.4m of the arbitration award simpliciter without having to prove anything at all on the value of the works done. The evidence revealed that the draft final account between Kosbina and the respondent had not been resolved during the last meeting between the parties. There was no evidence that the quantitative amount of the works done by the respondent under the subcontract had been agreed upon by both parties before or after the commencement of the arbitration. Equity could not

- A eclipse the subcontract and the respondent could not claim RM11.4m as a matter of convenience in total disregard to the sanctity of the subcontract (see para 38).
- B (4) The first suit, by MJE against Kosbina, based on the same arbitration award, was dismissed, *inter alia*, on the ground of limitation. The respondent, being MJE's privy, was caught by *res judicata* and issue estoppel as far as the finding of limitation was concerned. On that ground, the High Court should have dismissed the claim for unjust enrichment. The respondent could not use its claim for unjust enrichment as a tool to circumvent the law on limitation. The respondent's right to claim against Kosbina had remained intact for six years from the date of termination of the subcontract. Kosbina did not prevent the respondent from suing it due to the arbitration nor did it make any material representation to the respondent to await the outcome of the arbitration process between itself and the government. There was no forbearance to sue (see paras 39–40).
- C
- D (5) The need to impose a constructive trust on Kosbina to justify the demands of justice and good conscience did not arise. On the facts of the case, the claim under constructive trust was pleaded to circumvent the limitation period. The respondent, through its privy, had claimed for the sum under the same arbitration awards and had not succeeded. Its argument that its claim for constructive trust was premised on the ground that there was no contract was misconceived. Clearly, the subcontract existed. Accordingly, this was not a suitable case for the doctrine of equity and equitable remedies to be adopted (see para 42).
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- F

[Bahasa Malaysia summary]

- G Perayu ('Kosbina') telah diawardkan projek pembinaan jutaan Ringgit oleh kerajaan. Kosbina telah memberi subkontrak untuk menjalankan keseluruhan projek tersebut kepada Maju Jaya Enterprise Sdn Bhd ('MJE'). Di bawah subkontrak itu, MJE berhak kepada 92% komisyen dan Kosbina 8%. Kerja tersebut, bagaimanapun, telah dijalankan oleh responden yang dimiliki oleh orang yang sama yang memiliki MJE. Selepas memberikan Kosbina empat lanjutan masa untuk menyiapkan kerja itu, dan semasa kerja itu siap lebih
- H kurang 90%, kerajaan tiba-tiba menamatkan kontraknya dengan Kosbina yang mengakibatkan subkontrak itu juga ditamatkan. Kosbina memfailkan prosiding timbang tara terhadap kerajaan kerana penamatan salah dan telah diawardkan RM21,873,376.73 ('award timbang tara'). MJE kemudian telah menyaman Kosbina di Mahkamah Tinggi ('guaman pertama') untuk 92%
- I bahagian daripada award timbang tara itu berdasarkan formula pembahagian dalam subkontrak itu. Mahkamah Tinggi telah menolak guaman tersebut selepas memutuskan bahawa MJE adalah plaintif yang salah, kerana ia adalah responden yang telah menjalankan kerja tersebut, dan bahawa dalam apa keadaan tindakan telah luput had masa. Mahkamah Ryuan ('MR') telah

mengesahkan keputusan itu. Berdasarkan dapatan Mahkamah Tinggi bahawa subkontrak antara Kosbina dan MJE telah digantikan dengan yang lain antara Kosbina dan responden, responden telah memfailkan tindakan yang sama seperti guaman pertama terhadap Kosbina tetapi kali ini menambah tuntutan berdasarkan pengayaan tidak adil dan amanah konstruktif. Responden menegaskan bahawa award timbang tara itu telah secara tidak adil mengayakan Kosbina atas perbelanjaan responden; bahawa responden berhak kepada RM11.4 juta untuk bahagiannya daripada keseluruhan nilai kerja yang dilakukan dan kos yang terakru untuk projek tersebut; dan bahawa Kosbina memegang RM11.4 juta itu sebagai pemegang amanah konstruktif untuk responden. Dalam menjawab, Kosbina mempli bahawa tuntutan responden telah luput had masa dan bahawa dapatan Mahkamah Tinggi berhubung isu tersebut dalam guaman pertama terhadap MJE mengikat responden. Kosbina juga mempli bahawa responden tidak menunjukkan bagaimana ia berhak kepada RM11.4 juta itu atau mana-mana bahagian daripada award timbang tara itu. Mahkamah Tinggi memutuskan bahawa responden telah menjalankan kerja yang ia telah mengambil kontrak untuk lakukan dan mengawardkannya RM8,360,173.40 iaitu separuh daripada award timbang tara kurang bayaran tertentu yang responden tidak berhak kepada. Mahkamah juga memutuskan bahawa ia tidak berpatutan untuk Kosbina menyimpan keseluruhan award timbang tara itu dengan sendirinya tanpa menghiraukan 92:8 formula pembahagian yang dipersetujui di bawah subkontrak. Kosbina merayu kepada MR terhadap keputusan tersebut.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan/perintah Mahkamah Tinggi:

- (1) Kedudukan responden bahawa ia tiada subkontrak dengan Kosbina tidak boleh dikekalkan kerana dapatan Mahkamah Tinggi dalam guaman pertama yang telah disahkan oleh MR. Oleh itu terdapat subkontrak antara Kosbina dan responden yang telah menggantikan subkontrak antara Kosbina dan MJE (lihat perenggan 32).
- (2) Responden tidak boleh, di satu pihak, menafikan kewujudan kontrak antaranya dan Kosbina dan menegaskan bahawa tuntutan untuk pengayaan tidak adil telah dibuat di bawah undang-undang common law dan, pada masa sama, menuntut sebahagian daripada award timbang tara berdasarkan formula pembahagian 92:8 di bawah subkontrak tersebut. Tuntutan untuk pengayaan tidak adil tidak boleh dibuat secara berasingan daripada subkontrak tersebut. Mahkamah Tinggi dengan itu terkhilaf kerana membenarkan undang-undang pengayaan tidak adil untuk menggantikan, menggagalkan dan/atau melemahkan terma-terma jelas subkontrak antara Kosbina dan responden (lihat perenggan 31, 33–34 & 37).
- (3) Responden tidak boleh menafikan subkontrak dan tuntutan untuk

- A** berhak kepada RM11.4 juta tentang pemudah award timbang tara tanpa membuktikan apa-apa langsung mengenai nilai kerja yang dilakukan, Keterangan menunjukkan bahawa draf akaun terakhir antara Kosbina dan responden tidak diselesaikan semasa mesyuarat terakhir antara pihak-pihak. Tiada keterangan bahawa jumlah kuantitatif kerja yang
- B** dilakukan oleh responden di bawah subkontrak telah dipersetujui oleh kedua-dua pihak sebelum atau selepas timbang tara bermula. Ekuiti tidak dapat menafikan subkontrak itu dan responden tidak boleh menuntut RM11.4 juta sebagai suatu perkara yang mudah tanpa menghirau kesucian subkontrak itu (lihat perenggan 38).
- C** (4) Guaman pertama itu, oleh MJE terhadap Kosbina, berdasarkan award timbang tara yang sama, telah ditolak, antara lain, atas alasan had masa. Responden, yang merupakan privi MJE, terikat dengan res judicata dan isu estoppel setakat mana dapatan had masa adalah berkaitan. Atas alasan tersebut, Mahkamah Tinggi patut menolak tuntutan itu kerana
- D** pengayaan tidak adil. Responden tidak menggunkan tuntutannya untuk pengayaan tidak adil sebagai alat untuk mengelakkan undang-undang had masa. Hak tuntutan responden terhadap Kosbina masih kekal selama enam tahun dari tarikh penamatan subkontrak itu. Kosbina tidak menghalang responden daripada menyamannya akibat timbang tara itu dan tidak membuat apa-apa representasi material kepada responden untuk menunggu keputusan daripada proses timbang tara antara antaranya dan kerajaan. Tiada kesalahan untuk menyaman (lihat perenggan 39–40).
- E**
- F** (5) Keperluan untuk menggunakan amanah konstruktif ke atas Kosbina untuk mewajarkan tuntutan keadilan dan niat baik tidak timbul. Berdasarkan fakta kes, tuntutan di bawah amanah konstruktif telah dipli untuk mengelakkan tempoh had masa. Responden, melalui privynya, telah menuntut jumlah di bawah award timbang tara yang sama dan
- G** tidak berjaya. Hujahnya bahawa tuntutannya untuk amanah konstruktif adalah berpremiskan alasan bahawa tidak ada kontrak adalah tanggapan salah. Jelasnya, subkontrak tersebut wujud. Sewajarnya, ini bukan kes sesuai untuk doktrin ekuiti dan remedi ekuiti diguna pakai (lihat perenggan 42).]
- H**

Notes

For cases on issue estoppel, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8403–8432.

For cases on unjust enrichment in general, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7927–7933.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

- Banner Homes Group plc v Luff Developments Ltd and another* [2000] 2 All ER 117, CA (refd) A
- CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169, FC (refd)
- Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122, CA (refd) B
- Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
- Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788, CA (refd) C
- Lonrho plc v Fayed and others (No 2)* [1991] 4 All ER 961, Ch D (refd)
- Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42, CA (refd)
- Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1992] 3 All ER 737, HL (refd) D
- Appeal from:** Civil Suit No WA-22C-12-02 of 2016 (High Court, Kuala Lumpur)
- SK Liow (MH Teo with him) (Liow & Co) for the appellant.*
- Michael Chow Keat Thye (Foong Chee Keen with him) (Nik & Foong) for the respondent.* E

Tengku Maimun JCA (delivering judgment of the court):

- [1] This was an appeal by Kosbina Konsult (K) Sdn Bhd ('the appellant') against the decision of the High Court in allowing Madu Jaya Development Sdn Bhd's ('the respondent') claim for, inter alia, certain monies that the appellant obtained from the Government of Malaysia ('the government'). F
- [2] We had unanimously allowed the appeal. These are our full reasons. G
- THE BACKGROUND FACTS
- [3] On 12 June 2003, the appellant was awarded a contract by the government for a project known as 'Naik Taraf Laluan Persekutuan 136 Dari Persimpangan Jalan Masuk ke Lebuhraya Utara/Selatan Hingga Bandar Baru (Km 42-Km 50)' ('the main contract'). H
- [4] By way of a subcontract dated 5 May 2004 entered into between the appellant and Danaukhas Holdings Sdn Bhd ('Danaukhas') (now in liquidation), the entire works of the main contract was awarded to Danaukhas. The terms of the subcontract between the appellant and Danaukhas, inter alia, was that the appellant was entitled to 10% commission of the subcontract sum. The value of the main contract and the subcontract was RM48,325,771.65. I

- A** [5] Due to the slow progress of the works by Danaukhas, by a letter dated 13 January 2005, Danaukhas assigned the subcontract to Madu Jaya Enterprise Sdn Bhd ('MJE'). On 20 January 2005, a subcontract agreement was entered into between the appellant and MJE where MJE was awarded the subcontract works. The same contract terms between the appellant and
- B** Danaukhas were adopted except that with regards the commission, the ratio between MJE and the appellant was adjusted to 92:8.
- C** [6] As it turned out, most of the correspondences and work flow during the project was not between the appellant and MJE but between the appellant and the respondent. The common factor between MJE and the respondent was Angie Ng Suat Leh, PW2 ('Angie') who owns 99.99% shares of both MJE and the respondent.
- D** [7] Several problems arose in the course of the works resulting in four extensions being given by the government to the appellant. As at 16 February 2007, 90% of the main contract works were completed.
- E** [8] By a letter dated 21 February 2007, the government terminated the main contract. Consequently, the subcontract between the appellant and the respondent was also terminated.
- F** [9] Initially, the respondent were supposed to cooperate with the appellant to commence arbitration proceedings against the government for the purported wrongful termination of the main contract. However, as the matter progressed, the appellant proceeded on its own against the government without any contribution of finance or witnesses from the respondent.
- G** [10] In the arbitration against the government, the appellant claimed for various heads of damages while the government had also counterclaimed against the appellant.
- H** [11] On 6 July 2011, an interim award of RM7,781,369.05 was made in favour of the appellant. By a final award dated 10 October 2012, the appellant was awarded the sum of RM14,092,007.68 and the government's counterclaim was allowed for the sum of RM295,000. After making adjustments for the counterclaim, the appellant was awarded a total sum of RM21,873,376.73.

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PROCEEDINGS IN THE HIGH COURT

[12] In 2014, MJE commenced an action against the appellant in the High Court Kuala Lumpur claiming for compensation for works done in the project.

Amongst others, MJE claimed against the appellant a sum awarded against the government in the arbitration based on the sharing formula of 92:8 in the subcontract dated 20 January 2005.

A

[13] The action was dismissed by the High Court on 26 June 2015 principally on the ground that MJE was the wrong entity; that MJE was out of time in filing the action and that the various claims were not properly proven ('the first suit'). The decision of the High Court was affirmed by this court on 12 January 2016.

B

[14] Premised on the findings of the High Court in the first suit that the subcontract between the appellant and MJE had effectively been replaced by a subcontract between the appellant and the respondent, in February 2016, the respondent commenced the instant suit against the appellant. In the instant suit, the respondent added the claim for unjust enrichment and constructive trust.

C

D

[15] It was the pleaded case of the respondent that Angie had not caused any proceedings to be commenced against the appellant for the value of work done given the cooperation and the understanding that the parties would have worked together to seek recovery against the government.

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[16] It was further pleaded by the respondent that pursuant to the interim award and the final award, the total value of works done and also the costs incurred by and attributable to the respondent in respect of the project was RM11,420,791.93. The respondent contended that the appellant had received benefits at the expense of the respondent from the value of works done and also costs incurred for the project which formed the basis of the interim award and the final award. The appellant thus had been unjustly enriched at the expense of the respondent, and that further or in the alternative, the appellant was holding the monies or was otherwise accountable to the respondent to the extent of RM11,420,791.73 as a constructive trustee.

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G

[17] In its statement of defence, the appellant pleaded inter alia that the respondent's claim is time barred, the cause of action having accrued on 21 February 2007 when the main contract/subcontract was terminated. It was further pleaded that this fact had been ventilated in the first suit albeit against MJE and/or that the doctrine of res judicata and estoppel applies against the respondent.

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I

[18] The appellant further pleaded that the respondent failed to particularise the calculation of RM11,420,791.73 which is under the head of special damages; that there is no proper nexus pleaded between the amount claimed

- A and the arbitration awards and that the respondent was mala fide and selfish to 'piggyback' on the arbitration awards without making any contribution at all in terms of finance or witnesses.

FINDINGS OF THE HIGH COURT

- B [19] The learned judge allowed the respondent's claim on both unjust enrichment and constructive trust. Judgment was entered for the respondent for the reduced and apportioned sum of RM8,360,173.40 based on the ratio of 50:50 formula. His Lordship concluded that the respondent had proved that
- C they had executed all the works required of them in the main contract between the appellant and the government.
- D [20] The learned judge recognised that limitation had set in where the respondent's rights are concerned. However, His Lordship ruled that it would be totally unconscionable and grossly unfair and most unreasonable for the appellant to keep the whole of the award sums to themselves, in complete disregard to the expressed intention of 92:8 sharing formula.
- E [21] The learned judge took into account the fact that the appellant had proceeded with the arbitration with the risks in that, should the award be against the appellant and the appellant is held liable to pay the government, then the appellant will have to pay first before looking to the respondent for recovery of the sums paid. The learned judge therefore made an order that the
- F appellant retained 50% of the arbitral award and that the balance 50% be released to the respondent. His Lordship then made adjustments by deducting the respondent's portion for the amounts that the respondent conceded in evidence that they are not entitled to, before arriving at the sum of
- G RM8,360,173.40.
- H [22] His Lordship alluded to the principle that a constructive trust would be imposed by the courts to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties. In support of his finding on constructive trust, the learned judge relied on *CIMB Bank Bhd v Maybank Trustees Bhd and other appeals* [2014] 3 MLJ 169; *Lonrho plc v Fayed and others (No 2)* [1991] 4 All ER 961; *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42 and *Banner Homes Group plc v Luff Developments Ltd and another* [2000] 2 All ER 117.
- I [23] Dissatisfied with the decision of the High Court, the appellant appealed to this court.

THE APPEAL

A

[24] The argument for the appellant may be summarised as follows:

- (a) that the respondent's relationship with the plaintiff was no more than a contractual relationship for the project works and that the respondent's right to sue for works done if any, against the appellant was founded squarely and entirely on the subcontract;
- (b) that the learned judge failed to address the two distinct and separate contracts between the appellant and the government and between the appellant and the respondent;
- (c) that the learned judge erred in ignoring the sanctity of contract between the appellant and the respondent;
- (d) that there was no evidence to suggest that the parties had 'common intention' or that parties had manifested any conduct to show that there was cooperation and understanding that the parties would work together to seek recovery against the government to create a trust;
- (e) that the respondent was not entitled simpliciter to RM11.4m pursuant to the arbitral award; and
- (f) that the learned judge was in serious judicial error in entering judgment for the respondent on the 50:50 formula when it was never pleaded nor argued.

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[25] The respondent on the other hand submitted that its claim against the appellant was not founded on contract as there was no contract between the appellant and the respondent; that the respondent was not privy to the contract between MJE and the appellant and that the contract between MJE and the appellant had been abandoned.

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G

[26] On unjust enrichment, learned counsel for the respondent submitted that the appellant had been enriched by reason of the arbitration award as it was the respondent who did the works under a total subcontract.

H

[27] It was further submitted for the respondent that the respondent was not claiming for works done but that they were claiming for the proportionate share of the arbitration award and that the respondent's claim for unjust enrichment was based on common law.

I

[28] On constructive trust, learned counsel submitted that the learned judge had correctly referred to the relevant principles pertaining to the circumstances and that any payments received by the appellant from the government would have been affixed with a trust to the extent of the respondent's entitlement.

- A [29] In respect of the issue of limitation, it was submitted for the respondent that a cause of action in unjust enrichment would arise from the date the appellant was enriched and given that the appellant obtained the interim award and the final award on 6 July 2011 and 10 October 2012 respectively, the filing of the instant suit by the respondent in February 2016 was well within the six years limitation period.
- B

OUR DECISION

- C [30] Having perused the appeal records and having considered the submissions of the parties, we found that the real issue that requires our determination was whether the respondent could ignore or displace the subcontract and sue the appellant under unjust enrichment and constructive trust.

- D [31] We wish to state at the outset that it seemed to us that the respondent had taken a contradictory stand. The respondent on the one hand contended that the claim for unjust enrichment was made under common law and that there was no contract between the appellant and the respondent, but had on the other hand claimed for the proportionate share of the arbitration award under unjust enrichment. This begs the question: what is the basis of the proportionate share? It must certainly be based on the subcontract. The proportionate share came about only because of the agreement between the parties on the 92:8 formula.
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- F [32] The respondent's position that there was no contract was not tenable given the finding of the High Court in the first suit which was affirmed by this court and which had not escaped the learned judge's mind when he said: 'As stated though the Letter of Agreement was with MJE, for all practical purposes it is now read as referring to the Plaintiff as the Plaintiff was in effect the party carrying out the Works ...'. There was thus a subcontract between the appellant and the respondent which replaced the subcontract between the appellant and MJE.
- G

- H [33] It was further submitted by the respondent that it was entitled under the law to claim for unjust enrichment independent of the subcontract. In this regard the learned judge had relied on Goff & Jones, *The Law of Unjust Enrichment* (8th Ed, Sweet & Maxwell) and the English case of *Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1992] 3 All ER 737 to state, inter alia:
- I

... By same token, even if a cause of action in contract has expired because of limitation having set in, it does not prevent a claimant from pursuing this claim in unjust enrichment if that cause of action is still subsisting.

[34] With respect, we disagreed with the learned judge. Low Weng Tchung in his book *The Law of Restitution and Unjust Enrichment in Malaysia* states the following with which we respectfully endorsed:

[2.26] *Contractual agreement to prevail.* While it is now beyond question that the law of restitution and unjust enrichment is separate and distinct category of the law of obligations, it must always be borne in mind that the law of restitution and unjust enrichment cannot be utilized so as to override, subvert or defeat the terms of any contract between the parties, especially where such contract has made express provision as to the allocation of risk between the parties.

2.27 *No redistribution of risk allocation by contract.* Generally speaking, in the absence of any vitiating factors such as fraud, duress or misrepresentation resulting in any agreement being avoided ab initio, and where the agreement has not been frustrated due to impossibility of performance, the agreement between the parties should not be disturbed, and the courts should not invoke the law of restitution and unjust enrichment to redistribute risks which have been allocated by the mutual agreement of the parties.

[35] As propounded by the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, the law of unjust enrichment is recognised by which justice is done in a range of factual circumstances and the restitutionary remedy is applied to attain justice. Nonetheless we observed that in *Dream Property*, the law of unjust enrichment was articulated under the context of ‘The Relief Questions’. This is what the Federal Court said:

[93] So far we have dealt with the issue pertaining to the liability questions. We conclude that the defendant only paid 10% deposit of the purchase price and failed to pay the balance of the purchase price even though obliged to do so under the SPA. As correctly decided by the High Court and the majority of the Court of Appeal, the plaintiff had, in our judgment, validly terminated the SPA.

[94] This brings us to the relief questions.

The Relief Questions

Unjust Enrichment and Restitution

[95] To a large extent, this issue deals with the restitution that the defendant claims it is entitled to, over and above the costs of construction of the mall, under the law of unjust enrichment.

[36] The decision of the Federal Court in *Dream Property* in our view is of no assistance to the respondent. In *Dream Property*, the Federal Court did not move away or disregard the sanctity of contract between the parties as can be seen below:

[107] ... The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant

A land granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor.

B [37] We therefore agreed with the appellant that the learned judge erred in law in that His Lordship's decision is akin to allow the law of unjust enrichment to displace, defeat, override and/or undermine the clear terms of the subcontract between the appellant and the respondent.

C [38] We therefore resolved the issue in favour of the appellant. The respondent cannot subvert the subcontract and in this regard, we agreed with the appellant that the respondent was not entitled to RM11.4m of the arbitration award simpliciter without having to prove anything at all on the value of the works done. The evidence revealed that the draft final account between the appellant and the respondent had never been resolved during the last meeting between the parties. There was no evidence that the quantitative amount of the works done by the respondent pursuant to the subcontract had been agreed by both parties before or after the commencement of the arbitration. Equity cannot eclipse the subcontract and the respondent cannot claim RM11.4m as a matter of convenience, in total disregard to the sanctity of the subcontract.

F [39] The respondent took the position that the appellant had been enriched because it was not the appellant that had completed the works. That may be so, and indeed MJE had commenced action against the appellant in the first suit. It must be highlighted that in the first suit, MJE's claim was also premised on the same arbitration awards. The first suit was dismissed on, inter alia, the ground of limitation. The respondent, being privy to MJE would be caught by res judicata and issue estoppel as far as limitation is concerned. It was held by G the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 that when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the matter that had been adjudicated, as the judgment becomes the truth between such parties (see also the cases of H *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788 and *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122 which set out the principle that the doctrine of res judicata also applies to a non-party). On this ground, the claim for unjust enrichment ought to have I been dismissed by the learned judge. The respondent could not use its claim for unjust enrichment as a tool to circumvent the law on limitation.

[40] Further, we agreed with the appellant that the arbitration awards were the direct result of the legitimate arbitration process between the appellant and

the government pursuant to the main contract, which is a separate and distinct contract from the subcontract between the appellant and the respondent. The respondent's right of claim against the appellant remained intact for six years from the date of the termination of the subcontract ie 21 February 2007. The appellant did not concertedly prevent the respondent from filing any suit against the appellant due to the arbitration and neither did the appellant make any material representation to the respondent to wait for the outcome of the arbitration process between the appellant and government. There was no forbearance to sue.

[41] As for constructive trust, which is a trust imposed by equity in order to satisfy the demands of justice and good conscience, the court in *Sinar Wang Sdn Bhd*, held, inter alia, that equitable remedies and doctrines are flexible and adaptable to particular circumstances and that the court of Equity may mould the relief to be granted on particular facts.

[42] We were of the view that this was not a suitable case to adopt the equitable remedies and doctrine of equity. The respondent, through its privy, had claimed for the sum under the same arbitration awards and had not succeeded. The respondent's argument that its claim for constructive trust was premised on the fact that there was no contract was misconceived. Clearly, the subcontract existed. On the facts of this case, we were of the view that in effect, the claim under constructive trust was pleaded to circumvent the limitation period. The need to impose constructive trust on the appellant to justify the demands of justice and good conscience did not arise. We therefore could not sustain the decision of the learned judge on the respondent's claim under constructive trust.

[43] In the circumstances, we allowed the appeal with costs. The order of the High Court was set aside.

Appeal allowed unanimously and decision/order of the High Court set aside.

Reported by Ashok Kumar

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